DOCUMENT RESUME

ED 226 515 EA 015 470

TITLE	Law Enforcement Information and the Family Educational Rights and Privacy Act.
INSTITUTION	American Bar Association, Chicago, Ill.
SPONS AGENCY	Law Enforcement Assistance Administration (Dept. of Justice), Washington, D.C.
PUB DATE	81
NOTE	48p.; Prepared by the ABA's Section of Individual Rights and Responsibilities.
AVAILABLE FROM	Publications, American Bar Association, Division of Public Service Activities, 1800 M Street N.W., Washington, DC 20036 ($2.70).
PUB TYPE	Legal/Legislative/Regulatory Materials (090) -- Reports - Research/Technical (143)
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	Compliance (Legal); *Confidential Records; Federal Legislation; *Law Enforcement; *Police School Relationship; Postsecondary Education; *Privacy; Recordkeeping; *School Security; *Student Records
IDENTIFIERS	Family Educational Rights and Privacy Act 1974

ABSTRACT

The Family Educational Rights and Privacy Act (FERPA) pertains broadly to education records, though an institution can exempt its law enforcement records from FERPA coverage. The primary purpose of this report was to examine FERPA's effect on the flow of information between institutions of higher education and law enforcement agencies. Study findings are based on interviews with: (1) federal staff; (2) representatives of national college and university organizations; (3) over 100 persons representing 7 colleges and universities that differ in location, size, and governance; and (4) local law enforcement officials whose jurisdictions bordered the institutions surveyed. The report discusses recordkeeping practices at academic institutions, summarizes the important provisions of FERPA, then discusses in more detail the institutions surveyed. Law enforcement appears not to have been negatively affected because the relevant provision of FERPA has not been strictly followed. It is recommended that FERPA be amended to permit exchange of education and law enforcement information when an institution determines that such exchange is in the interest of the institution, its students, or the public. (MLF)

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LAW ENFORCEMENT INFORMATION AND THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

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A Report by
The American Bar Association

Section of Individual Rights and Responsibilities

EA 015 470

LAW ENFORCEMENT INFORMATION

AND

THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

A Report By The American Bar Association

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ACKNOWLEDGMENT

This project, funded by the Law Enforcement Assistance Administration, U.S. Department of Justice, was sponsored by the Privacy Committee of the American Bar Association's Section of Individual Rights and Responsibilities. Though the committee exercised general oversight of the project and reviewed this report, any findings or recommendations here are not to be construed as reflecting the policies or views of the American Bar Association, which has taken no official position on the report, one way or another.

I am grateful to the members of faculty and administration at the several colleges and universities surveyed for this project, and to the representatives of national organizations who granted us interviews. They cooperated fully, expressed themselves candidly and made this effort possible. Consistent with the subject matter of the study, we promised confidentiality, so I will not name the academic institutions or the individuals who aided in this effort; you know who you are, and you are appreciated.

Many thanks to Judge Charles Joiner and his privacy committee, who provided advice and counsel throughout the project and who reviewed this report. Special appreciation is due Daniel L. Skoler, Director of the American Bar Association's Division of Public Service Activities during this project, who was primarily responsible for the development and design of this program; he aided in its execution and his remarkable skills have improved the result. Carol Kaplan, Director of the Privacy Staff of LEAA's Bureau of Justice Statistics, was the project monitor; thanks, too, for her cooperation in bringing this effort to a successful conclusion.

As project director any errors or shortcomings in this report are my responsibility, but I acknowledge the splendid assistance of Dennis Hudson, my senior research assistant at The John Marshall Law School, and Elena Cohen, a research assistant at the Washington, D.C. office of the American Bar Association. Diane Gordon, at the Law School, provided excellent secretarial support, and Joane Rashbaum, staff director of the Section of Individual Rights and Responsibilities, was extremely helpful in administrative liaison with ABA's Washington office.

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PREFACE

The Section of Individual Rights and Responsibilities of the American Bar Association, through its privacy committee, has undertaken a variety of activities dealing with privacy and the relationships between individuals and the institutions which maintain information about them; this project is one such effort.

In 1974, the passage of the Family Educational Rights and Privacy Act [1/] ("The Buckley Amendment", hereafter referred to as FERPA,) created great consternation among academic institutions throughout the United States, and was heralded as legislation that would be difficult to administer and would impose substantial burdens upon academic institutions. [2/] The Act, which is summarized in the Introduction of this report, pertains broadly to "education records", though an institution can exempt its "law enforcement records" from FERPA coverage.

The primary purpose of this project is to identify the practices concerning law enforcement access to education records in postsecondary educational institutions (colleges and universities) and to examine FERPA's effect on the information flow between such institutions and law enforcement agencies. The Section engaged the services of Professor George B. Trubow, of The John Marshall Law School of Chicago, as its project director. Professor Trubow worked with Judge Charles Joiner, Chairman of the Section's Privacy Committee, and with Daniel L. Skoler, Director of the Division of Public Services, under whose umbrella the Section functions. The project was composed of four major tasks; (1) a search of literature, statutes and legislative history concerning the law enforcement aspect of FERPA; (2) interviews with the Fair Information Practices staff of the Department of Health, Education and Welfare, and with representatives of a variety of national organizations representing the college and university community; (3) field interviews at seven colleges and universities throughout the United States, involving more than 100 persons representing the administration, faculty and students at these institutions, and interviews with local law enforcement officials whose jurisdiction bordered the institutions surveyed; and (4) analysis of data and preparation of this report.

It is not pretended that the handful of institutions of higher education selected for this survey represent a scientifically sound sampling for statistical purposes; there are hundreds of colleges and universities in the United States, and this project was modestly funded as a "mini-survey." Nevertheless, the institutions were chosen from two separate geographic areas of the country and do represent a wide cross-section: student populations ranged from 2,500 to 25,000; some of the institutions were private, some were public, some were secular and some were religiously oriented; some were in large urban areas and had a sizeable commuter student body, while others had mainly resident students and were situated in relatively isolated communities wherein the academic institution was the significant "industry". There were enough similarities and consistencies in what was learned about FERPA at these institutions, reinforced by the interviews with national organizations, to allow the project staff and privacy committee to feel comfortable in presenting some general findings and recommendations.

The report is organized as follows: the Introduction discusses record-keeping practices at academic institutions and summarizes the important provisions of FERPA; next are the Findings and Recommendations; FERPA Implemetation discusses in more detail how the survey institutions are complying with the legislation, and law enforcement concerns regarding FERPA are highlighted; the Conclusion is brief, and optimistic.

The Section of Individual Rights and Responsibilities expresses its appreciation to the project staff and to its Privacy Committee.

Peter F. Langrock, Chairperson
Section of Individual Rights and
Responsibilities

INTRODUCTION

The primary purpose of this project is to examine FERPA's effect on the flow of information between institutions of higher education and law enforcement agencies. To accomplish this it was necessary in the course of the study to become somewhat familiar with the overall record keeping systems of colleges and universities and with the general flow of information within a campus and between an institution and third parties. (For purposes of this report, the first party is the student, the second party is the institution-record keeper, and the third party is any other entity. Thus, requests for information made by any unit of the institution are considered second party requests even though another unit of the institution is the record keeper of whom the request is made.) More was learned about FERPA and academic records than pertinent only to law enforcement information matters, and this report presents what was learned.

Summary of FERPA's Requirements

The Family Educational Rights and Privacy Act of 1974 (PL 93-380 Sec. 513), commonly known as the "Buckley Amendment", was signed into law on August 21, 1974. [3] The Department of Health Education and Welfare, responsible for the enforcement of the Act, issued the final regulations for implementing the Act, as amended (PL 93-568 Sec. 2), on June 17, 1976. [4]

As to institutions of higher education, FERPA's aim is to give to college students a measure of control with respect to the student's education records. The major provisions of the Act allow students to have access to their education records, to challenge the accuracy of the records, and to control third party access to those records.

The Act applies to all educational institutions receiving funds under any federal program administered by the Office of Education, including institutions whose students receive funds from this source. [5] The focus of this report is on colleges and universities; at the postsecondary level rights under the Act are vested in the student. [6] To be within the scope of the Act, the student must currently be or at some time past have been enrolled at the institution. [7]

The Act applies only to "education records," defined as "those records, files, documents, and other materials which contain information directly related to a student" and maintained by an institution or someone acting in behalf of the institution. [8] The Act provides for exemptions from the definition of "education records": (1) personal or "desk drawer" notes made by teachers or administrators, maintained in their sole position and not accessible or revealed to anyone else other than a substitute; (2) records maintained by a "law enforcement unit," provided that the records are used solely for law enforcement purposes, are available only to law enforcement officials of the same jurisdiction, are maintained separately from education records, and the law enforcement unit does not have access to education records; (3) records of an institution's non-student employees; and (4) medical or

psychological treatment records maintained by professionals acting in a professional capacity in connection with treatment of the student, and available only to other professionals engaged in treatment, or to a professional of the student's choice. 9/

Directory information routinely may be disclosed without consent of the student provided that he has been so informed and annually is given an opportunity to object; in case of objection directory information is not to be disclosed. Directory information is defined by FERPA as including:

> "The student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." 10/

The institution is obligated to allow students to inspect and review their records within a reasonable amount of time, and to challenge the accuracy of the record at a formal hearing held by the institution. 11/ The student can include an explanation in the record if a challenge to the record fails. 12/ The institution may not disclose education records without the consent of the student unless the disclosure is to appropriate school or governmental officials, testing and accrediting organizations, parents of a dependent student, disclosure pursuant to a court order or subpoena and in emergency situations where access is necessary to protect the health or safety of the student or others. 13/

The institution is required to adopt formal policies with respect to FERPA implementation, and must maintain a record of those to whom disclosures are made (unless the disclosure is of a kind permitted without student consent). 14/ The institution is also required to notify students of their rights under the Act. 15/ HEW has the responsibility to enforce the Act and may penalize non-compliance by withholding federal funds. 16/

How Are Records Kept?

The kinds of records, and the methods of record keeping, vary with each institution surveyed. Manual records are currently the backbone of information in the institutions visited, and that is assumed generally to be the case in academia. The advent of microprocessors is making electronic data storage increasingly feasible and prevalent, the characteristics of record-keeping are changing and automation may soon be the norm. 17/ The distribution of record systems varies with the size of the institution and its complexity in terms of academic departments and services, but it is accurate to characterize academic records as highly decentralized. At the risk of over-simplifying, but nevertheless to provide a relatively adequate display of academic record-keeping, the kinds of records maintained, their location, content and data flow patterns are summarized here.

Admissions. The school admissions office develops a file (exempt from FERPA) 18/ which largely becomes incorporated into the institution's education records (which are then subject to FERPA) once the applicant is admitted. The admissions file is created when a prospective student sends in an application, and the file will include the application and whatever materials are required by the

institution. Typical admission files contain a high school transcript, scholastic aptitude test scores, and an application which varies in content by institution but which usually displays personal information about applicants and their families. Schools often require letters of recommendation; a student may waive his rights to see such letters as were furnished pursuant to a promise of confidentiality. [19] When an applicant is admitted, the file moves to the general records of the institution or to the component unit where the applicant has been accepted. Thereafter, a variety of records and files are generated in accord with the organization and service structure of the institution.

Academic records and transcripts. The academic files usually include most of the admission file information, supplemented by academic information developed during the course of the student's education. This file is maintained in the registrar's office and includes the "official record," usually referred to as the transcript, which shows the courses the student has taken and the credit received for them. The transcript also includes the student's identification information, (name, birthdate, social security number) permanent address, name and address of parents, and name and address of the high school from which the student graduated. The treatment of disciplinary information on transcripts varies; some schools record disciplinary information on the transcript while others do not. Frequently, distinctions are made between academic discipline (dismissal for poor scholarship) which is recorded on the transcript, and other discipline (suspended for vandalism) which is not. It is often the case that non-academic discipline noted on the official transcript is obliterated when copies of the transcript are given to third parties.

Academic information is replicated in a number of files maintained in the institution. For instance, in a university setting, redundant academic information could be maintained in the registrar's office, the office of student affairs, in the office of the dean of the college within the university in which the student is enrolled (e.g., liberal arts school) and in the departmental office of the student's major discipline (e.g., English department). The amount of duplication varies depending on the particular procedures within the institution and the information deemed useful for those who contribute to the student's academic progress. In a highly automated electronic information system a student's complete record could be stored in one data bank, with access from remote terminals limited by inquiry codes assigned to institutional personnel on a need-to-know basis. We encountered no such system in our survey; however, this kind of information processing is likely in the near future.

Business and Financial Records. The business records of the school, often maintained by a comptroller or other finance officer, relate to fees and charges owed the institution by the student, together with a record of credits to the student's acccount. Depending on the size of the institution, the business office may also keep scholarship and financial aid records, though commonly financial aid information is maintained separately. While business records customarily contain little personal information, financial aid files usually include information on student and parent financial condition, as well as information about the student's academic status.

Student Affairs. This title is a catchall for academic and nonacademic information maintained in an office of student affairs (or student development) headed by a dean of students, or the like (Vice President for Student Personnel, e.g.). For purposes of uniformity this report uses the terms dean of students and office of student affairs. The office of student affairs file, in addition to directory

information and a copy of the transcript, may include the student's class schedule for the term, notations on academic or behavioral discipline, membership in campus organizations, awards, extracurricular employment, and other information pertinent to a particular student, such as counselling history.

Though what is kept in the office of student affairs file varies markedly from one institution to another, those contacted in this survey reported that subsequent to FERPA there has been a decrease of informal notes or subjective information kept in the file. For instance, whereas prior to FERPA the dean's file might include some notes made about the substance of a counselling visit with a student, now the file may only show that the student had met with the dean; any further information about the visit will be kept in the dean's head, or perhaps in the form of desk notes not subject to FERPA. The project team did not interview anyone who said they kept personal desk notes apart from a student file, however.

Health and Medical. Most schools require that the student upon matriculation fill out a health information sheet on past medical history which causes the file to be opened and maintained at the student health service; a physical examination also may be required for admission, and the results of that would be in the file. At small schools a health clinic may be staffed by a full or part time nurse, and perhaps by a part time physician, so the school may have responsibility only for routine health and medical care. An outside health care provider may furnish additional health service to students pursuant to a contract with the student or the instituton, in which case the institution will have few, if any, health records. Larger schools with clinics, infirmaries and hospitals have the potential for extensive medical care and therefor may record more information about the student. Generally, health information is compiled only as the student voluntarily appears at the institution's health facility for treatment.

Guidance Counselling. This category of information relates to records kept in connection with career development: advice on curriculum; subject and teacher selection; employment. In small schools, one faculty advisor may provide all such counselling for a student, perhaps sharing the responsibility with a placement office which acts as a clearinghouse for job referrals as the student nears graduation. In some schools a guidance center may provide specialized counselling and aptitude or psychological testing. These records probably are not part of the file maintained by the registrar's office, but may be replicated in the files kept at the school or departmental level.

Psychological Counselling. All the institutions visited offer the opportunity for psychological counselling either through a resident counselling staff or by referral to a service outside the school. In some institutions, even the fact that the student is receiving psychological counselling will not be recorded in any other education files. The practice here varies, however; some deans or advisors might note in their record the fact that a student had been referred for such counseiling. This survey found no instance in which the official transcript would note such information.

Housing. Housing information is frequently maintained under the supervision of the office of student affairs when a student is occupying institutional housing. Such a file would contain a copy of the student housing contract and information regarding fees, charges or assessments referred to the business office. In some institutions, student dormitory counsellors may keep notes about students for whom

they are responsible, but this probably is rare. (In one denominational school surveyed, the dormitory counsellor writes an evaluation each semester on each student in the counsellor's dormitory unit; this evaluation goes to the office of student affairs.) If a student is occupying off-campus housing the institution probably maintains no housing information at all, since the usual role of the office of student affairs in such case would be merely to act as a referral service to post "for rent" notices.

Discipline and law enforcement. This category refers to information concerning the student's conduct and behavior apart from academic discipline meted out for failure to attend classes, submit a paper or the like; it includes such conduct as theft, vandalism, or disturbing the peace. The disciplinary record system depends upon how the school's law enforcement and adjudication functions are handled. All the schools surveyed have some sort of law enforcement or security unit, the nature and composition of which varies with the size and location of the institution.

Small schools in suburban or rural environments, if they have a security office at all, tend to employ uniformed but unarmed security personnel whose main responsibilities are to patrol the campus to discourage vandalism or disturbances, see that buildings are locked and be on the lookout for fires or unusual circumstances. If a student is encountered who is misbehaving, such a security officer may intervene and bring the matter to an end without making an official report, or an incident report containing the name of the student and the nature of the misbehavior may be prepared and filed with the security office or dean of students. Security personnel may contact the town police for support and assistance in the event of an unusual or threatening situation. If an arrest is made, the student will be taken to police headquarters, booked and processed in accord with criminal procedure; in such case a file will be opened by the local police in addition to the information supplied to the institution's authorities by the security office.

Some institutions (mainly larger urban schools) have uniformed and armed personnel who provide a complete range of law enforcement services including buildings and grounds security, traffic control, investigations, peace-keeping and apprehension of offenders. No institution has a jail, however, and if it is necessary for a student to be arrested, he is taken to the local police station for booking into the jurisdiction's criminal justice system. Again, in case of arrest, an incident report would be filed within the institution, and information in the public criminal justice system would be generated in the course of ordinary procedures there.

Incident reports may be initiated by other than campus police; for instance, a student or faculty member who witnesses student misconduct may report it to the appropriate institutional authority. If a student misbehaves off campus and encounters the local police, treatment usually varies with the severity of the situation. In minor instances of rowdyism or drunkenness, the student may be taken to police headquarters and held while the campus police are summoned to take charge of the student. In such instance, the police may file no report disclosing the student's identity, and only an incident report is filed at the institution by campus police. On the other hand, in case of gross or criminal misconduct the local police may arrest and book, and perhaps incarcerate, before releasing the student to campus authorities. Once again, information will be generated within the public criminal justice system as well as within the institution.

Access to and dissemination of ordinary criminal justice information about a person who happens also to be a student is outside FERPA and beyond the scope of

this report. An interested reader may consult other publications for a discussion of that question. 20/ As to the further processing of information in an institution once an incident report has been filed, the school's structure and procedures will govern.

Most schools have some sort of judiciary board composed both of faculty members and students. Some of the institutions surveyed have a student attorney general whose responsibility it is to investigate complaints, present a case before the disciplinary board or make recommendations to compromise or resolve a complaint. Judiciary board determinations are usually recommendations to the dean of students, with an appellate process that may go up to the president of the institution. In every instance encountered, it was the case that proceedings of the judiciary board were afforded the strictest confidentiality. The fact that a particular student is in a judiciary board proceeding is often not advertised, and though the penalty meted out by the board may be announced, the name of the student penalized is rarely, if ever, publicized. If a student is expelled from school for non-academic discipline (and this had not happened in recent memory at the survey institutions) the fact of dismissal from school (but not the reason) would be entered on the transcript, according to those interviewed; several administrators said that if a student is later readmitted the notation of his prior dismissal would be expunged from the transcript. The records of board proceedings are routinely sealed after determination, preserved for some period of time (usually 5-10 years) and then destroyed.

FINDINGS

1. Institutions of higher education do not appear to be significantly burdened by FERPA requirements.

2. FERPA has opened records, often including those of campus law enforcement, to student access.

3. FERPA has changed the practices of record keepers regarding subjective information, and much less of it is included in education records.

4. FERPA has closed education records to third parties, absent student consent; there may be "informal" sharing of education information with local or other governmental police authorities, however.

5. FERPA does not seem to have had a negative effect on public law enforcement effectiveness, either because education records are not routinely important to police, or perhaps important information in such records is made available to the police informally.

6. Institutions generally do not have policies and procedures restricting access to education or law enforcement records by their own administration or faculty, nor are logs of access to records kept.

7. Neither the status of campus law enforcement units, nor the FERPA requirements regarding such units, are clearly understood by administrators or faculty.

8. Institutions have taken adequate steps generally to inform students about FERPA and their rights thereunder, though students seem to be unconcerned; students rarely request to see their records, and there was no evidence of student complaints about abuse of record confidentiality.

RECOMMENDATIONS

1. Institutions should develop policies governing access to education and law enforcement records by officials or faculty members of the institution itself, and should maintain logs of record access.

2. HEW should clarify and publicize current requirements regarding the exchange of information as between a campus law enforcement unit and non-law enforcement records, and between the campus law enforcement units and local and other non-institutional law enforcement agencies.

3. FERPA should be amended to permit exchanges of education and law enforcement information when an institution determines that such exchange is in the interest of the institution, its students or the public.

4. Institutions should develop and present to appropriate personnel instructional materials and programs to explain FERPA procedures and to accurately communicate the records management policies of the institution.

DISCUSSION OF FERPA IMPLEMENTATION

The foregoing findings and recommendations can best be appreciated in the context of what was learned during the survey. As previously indicated, the survey team learned more than pertinent only to the flow of information between institutions and law enforcement agencies, so the larger dimension will be presented here. The discussion is organized into four sections: (1) Notice to students of FERPA rights; (2) Student access to records; (3) Institution (second party) access to records; and (4) Third party access to records.

Notice of FERPA Rights

Institutions have taken steps to alert students to the existence of FERPA. Typically, the annual catalog or academic announcement of the institution carries a statement declaring compliance with FERPA requirements. Additionally, all the survey schools notify students of rights and access procedures pursuant to FERPA. Some schools supply a copy of the FERPA procedures bulletin at registration; other institutions post copies of FERPA notice and procedures on institutional bulletin boards used to communicate official announcements to the students while making copies of the regulations available to students at the office of student affairs. (One institution of some 20,000 students posts a bulletin and advises students that they can secure a copy at the office of student affairs; the surveyors were informed that during the year this school receives only four or five requests from students for individual copies of the FERPA procedures.)

A typical notice of FERPA policy and procedures, may include the following:

1. A summary of the purpose and effect of the institution's policy.

2. A definition of "student" and "education records".

3. A list of the kinds and location of records maintained, and the title of the person in charge of the records.

4. The procedures to be followed by the student to access his records, and the procedures for waiving access rights to confidential letters of recommendation.

5. A description of "directory information" that is disseminated without consent of the student, together with notice of procedures by which a student may object to the disclosure of directory information. (Some institutions designate a narrower range of directory information than defined in FERPA.)

6. A statement of the kinds of information or circumstances wherein prior consent of the student is not requried, in accord with FERPA.

7. The procedures whereby a student can request amendment of his record, appeal a denial of amendment, or include an explanatory statement.

Student Access to Records

All the survey institutions report that there are very few formal requests from students to see files. Though logs of student requests are not kept, officials estimated one or two requests a year at small schools, and five or six a year at large schools. It appears, therefore, that there is no compelling curiosity on the part of students with respect to what information is in their files. Students make routine inquiries that were honored before FERPA, such as a request to see a statement of account or to examine the official transcript.

Exempted from FERPA classification as "education records", and therefore not subject to student access, are the "desk notes" kept by faculty or administrators for their personal use and shown only to substitutes, non-student employment records, health and medical records, and law enforcements records. In post-secondary institutions, desk notes on individual students are probably a rarity, and thus do not constitute a significant information source. With respect to postsecondary institutions, FERPA does not provide access by students to financial records of their parents, or to confidential letters of recommendation. 21/

Five of the schools surveyed do not exercise the FERPA health exemption but instead permit a student to see his health and medical records in the presence of an institutional physician; the remaining two observe it and disclose medical records only to the student's designated physician, though neither institution had received such a request apart from private medical treatment sought by a student. Three of the schools also choose to ignore the law enforcement exemption and permit students to see records kept by campus police, even though such information is maintained separately from education records.

It appears that the institutions are complying with FERPA in affording access by students to their records; this is a change in policy at the survey institutions, and it is assumed the same applies elsewhere. Prior to FERPA it was not routine for students to have access to their education files, except as to business records and transcripts; the attitude of record-keepers vis-a-vis students was to presume non-disclosure. The understood and accepted presumption is now the reverse, and no administrator or faculty member interviewed suggested that the old way was better.

The procedures whereby a student gains access to his record varies as between institutions and within any one institution. The student must first show proper identification. In some offices a student is required to fill out a written request and an appointment is made for him to view the file; in others, the student makes an oral request and is promptly shown his file. The difference in procedure relates to the availability of school personnel and the difficulty in retrieving the file. It is more usual for the office of student affairs to require a written request and an appointment so that a staff member can be assigned to secure the file and be present while the student examines it. Office of student affairs staff are frequently engaged in meetings, conferences and counselling, and could not be casually interrupted to allow student access to records, even though such requests are extremely rare. On the other hand, a request to the business office regarding the status of an account is generally presented orally and the record is made available immediately; business office personnel are readily available and records easily retrieved.

Most of the individuals interviewed indicated that information would not be given to a student over the telephone, but the request would have to be made personally so that student identification could be verified. Three individuals did state, however, that a telephone inquiry from a student might be answered if the student's identity could be adequately verified. There is possibility in such case of an imposter, but the students at small schools may be known well enough to be adequately identified over the phone. This does not appear to be a significant problem, since telephone inquiries are treated with caution.

It seems, therefore, that FERPA has been successful in opening education records to college students, though students seem to have little interest in what may be in their files since there are a negligible number of requests for access.

Institutional (Second Party) Access

This topic deals with access to student records by institutional personnel; for example, a counsellor asks the office of student affairs for information about a student. It appears common for any member of the faculty or administration at the survey institutions to get access to any student record, sometimes by informal request made over a telephone. Most of the individuals interviewed did display a reluctance to give information over the telephone to other institutional personnel unless there was some way of making an adequate identification. In spite of the expressed reluctance to make telephone disclosures, the surveyors got the impression that simple telephone requests by institutional personnel for a small amount of information are routinely answered whereas if substantial information is sought then a written request or an appearance in person would be expected. The problem, of

course, is one of security. A pretext phone call by an imposter might succeed in gaining information from a student record. The survey team was not told of any known instance of pretext access, but such abuse is possible. The survey institutions do not keep logs of requests by institutional personnel, so such breaches would be difficult to monitor. As in any situation of confidential information, only in rare instances should telephone inquiries receive direct response.

FERPA permits disclosures of education records to "school officials, including teachers . . . who have been determined . . . to have legitimate educational interests . . . ." 22/ The institution should have a policy with respect to the circumstances in which someone within the institution may have access to education records. FERPA requires logs to be kept of those who have requested or obtained access to other than directory information, except that such logs need not be kept regarding requests by the institution's officials or teachers. 23/

If a school permits all its administration and faculty members to access education records, the possibility for abuse exists, and since logs are not kept it would be difficult to detect the abuse. If the institution devises a policy identifying the routine instances wherein access is appropriate and requires special approval for unusual requests by a second party, the students' interests would be better protected. The project staff has no reason to believe that school faculty routinely poke into student records out of curiosity or malice, and hesitates to make recommendations beyond those appropriate to law enforcement matters. In this instance, it seems advisable to emphasize the development of institutional policy (as FERPA requires) and logging of unusual second party requests (which FERPA does not require) as comparatively easy ways to discourage abuse.

The only clear and uniform exception to generally free access within the institution relates to medical and psychological records; health care providers maintain that they do not disclose information in student records to anyone in the institution without the student's consent. No contrary evidence was found, and the survey team accepts as accurate the confidentiality claims. Exceptions are cases where others within the institution are cooperating in the treatment of a particular student, or in rare instances when the welfare of the student or others might require disclosure, which are allowed by FERPA anyway. Psychological counselors say that they do not even disclose whether a student is using the counselling service. If a faculty member or institutional official has referred a student to the counselling service and calls to see whether the student had appeared, that question probably is answered, though the substance of any counselling reportedly is not disclosed.

Access by Third Parties

FERPA has served to make a student's specific consent the operative device by which third parties gain access to student records, save for directory information and the enumerated exceptions in the Act. The institutions report that it is rare for any student to restrict directory information since students consider it a convenience that such information is available. One moderately large institution said that in the prior year there had been only one request to restrict directory information.

All the individuals interviewed indicated that student information would not be given to third parties over the telephone; many said this even if only directory information is requested -- enquirers must send in written requests or appear personally.

Parents occasionally make inquiries about their children's education records, but information is not supplied unless the child is a dependent for tax purposes. [24] Registrars and business office personnel noted that one of the more difficult tasks is to explain to parents that they are not permitted to receive information about non-dependent children without the child's consent.

Visiting friends and relations make inquiries on campus to locate a student who may be away from his school residence. The visitor may go to the administrative office to find out the student's class schedule, which is not part of directory information. The uniform answer from the institutions surveyed was that the visitor will not be told where the student is, but the student will be promptly told who is waiting to see him.

Prospective employers are the most common third party requester, especially as students near graduation. In many schools a placement office develops a file of materials that can be forwarded to employers upon request, but the student must sign a consent form authorizing release of such information. Though it is in the student's interest for prospective employers to receive information from education records and students routinely provide consent, nevertheless the student makes the choice. One employment practice that has been interrupted by FERPA, previously observed by some smaller schools, is the situation wherein a prospective employer contacts the institution and asks for the records of students who display a certain profile, e.g., those majoring in a particular subject area or who have taken specific electives. Now such employers post that notice through the placement service and any interested student can elect to contact the employer. This restricts a practice that probably was not harmful to students, but it does prevent education records from being examined for such purpose without the student's knowledge.

Landlords, creditors and insurers comprise another category of third party enquirer. Landlords may contact the institution when a student is seeking off-campus housing to learn whether the applicant is a student and whether the student's housing experience at the institution was satisfactory. Directory information answers part of the question; information about the student's housing experience is another matter, and in accord with FERPA, should be released only with consent. Two persons interviewed said that when nothing negative appears in a student's records, they say so, but that they do not disclose negative information; their purpose is to be helpful to the student, though such a procedure is technically a violation of FERPA. In the case of a third party who frequently enquires -- perhaps the manager of a large apartment building occupied mainly by students -- the requestor could detect a pattern: the institution's representative would say so if no derogatory information was in a file but would decline to give any information in other circumstances. This practice has implications for other areas of information flow, as well, and ought not to be encouraged.

Creditors sometimes contact the institution for an address, or for a class schedule so that the student can be confronted personally regarding a bad debt. Requests for directory information are generally answered but, as in requests from friends or visitors, the class schedule would not be provided.

Insurance companies may make requests to verify information relevant to an application for or a claim against an insurance contract; except for directory information nothing else is supplied without consent of the student, according to all persons interviewed about this matter.

The institutions surveyed do not keep formal logs or records of requests from third parties, as required by FERPA. This is not as severe a problem as might be envisioned, however, because almost all requests for disclosures to third parties must be in writing, and thus the written request in the student's record serves as a log. A separate log, though technically required, is not so important in such circumstances.

Law Enforcement Records

As indicated previously, an institution may claim an exemption from FERPA for records held by its law enforcement unit only if such records are kept separate from education records, are used only for law enforcement purposes, are disclosed only to law enforcement agencies of the same jurisdiction, and when the law enforcement unit maintaining the records does not have access to education records. The effect of the exemption is to: permit an institution to deny student access to its law enforcement records; prevent education records from being disclosed to law enforcement units, and; limit disclosure of law enforcement records only to other law enforcement agencies "of the same jurisdiction." 25/ FERPA does permit education records to be disclosed in "emergency situations" that threaten the safety of students or others. 26/ Such an emergency disclosure would not address routine investigations by police or situations wherein property rather than person is jeopardized. (A fuller discussion of the emergency exemption, from the Privacy Protection Study Commission report, is set out below.)

It does not appear necessary that disclosures to law enforcement agencies should be limited to "agencies of the same jurisdiction." It is unclear what constitutes the same jurisdiction, and further there appears to be little reason why a police department in Spokane, Washington, or a federal law enforcement agency in Washington, D.C., ought not to be able to make legitimate requests of a college in New York.

There appears to be substantial confusion among colleges and universities regarding the status of campus security units and the requirements regarding exchange of information with such units. It is not unusual, for instance, for campus and other institutional officials to be unclear as to whether the campus security records are exempted from FERPA in the particular institution; in two instances the campus security office thought such records to be exempt while the office of student affairs said campus security records had not been exempted. Additionally, though the dean of students is responsible for student discipline, that person may or may not have been classified by the institution as a law enforcement "unit," but most deans were unaware of the technicalities of that classification. The difficulty arises when a dean of students, because of his responsibilities, has access both to law enforcement and education records; under FERPA this arrangement invalidates an exemption for law enforcement records. (A threshold question is why an institution would want a law enforcement exemption in the first place; as previously noted, a significant number of institutions surveyed choose not to take advantage of this exemption.)

An institution's law enforcement unit might keep two kinds of information: (1) incident reports, traffic citations or records of other "formal" transactions, and (2) investigative and anecdotal information. There is little reason for information in the first category to be closed to the student who is probably aware of it anyway. The latter category includes reports filed by campus personnel who have investigative responsibility (in connection with a campus drug abuse investigation, for instance) or information supplied by non-law enforcement personnel (an anonymous tipster, for instance). If campus authorities are investigating a suspected violation they probably do not want a student to have access to such information until the investigation is completed.

This dichotomy of law enforcement information is not unique to the academic environment, and is encountered in governmental law enforcement record keeping. Regulations promulgated by the Department of Justice with respect to the privacy and confidentiality of criminal justice information recognize the category "intelligence and investigative information," police authorities are not required to disclose such information to the data subject, though he would have access to arrest and conviction information in his files. 27/

When there is reason for an institution to claim a law enforcement exemption then the current provision of FERPA appears to be inadequate. The Privacy Protection Study Commission (established by the Federal Privacy Act of 1974 to study questions of informational privacy) in its 1977 report, partially addressed the problem. The Commission's comment is as follows:

> "Current FERPA requirements make it difficult for an educational institution to deal with both its own law enforcement unit, if it has one, and with local law enforcement agencies. In the first case, if an educational institution discloses student records to its own law enforcement unit, all records of that unit become subject to FERPA. In the second case, while restricting disclosures of student records to local law enforcement agencies is laudable in most instances, it creates a problem when the educational institution is a party of interest in a criminal investigation or when disciplinary problems and delinquency problems involving violations of law are difficult to differentiate. The Commission believes this problem demands a three-part resolution: (a) assuring that a parent or student has access to any recorded information used to make any disciplinary decision about the student; (b) holding an educational institution responsible for the quality of the information it uses to make disciplinary decisions about students or discloses to third parties that will make such decisions; and (c) assuring that an educational institution is in a position to get the help it needs from both its own law enforcement unit and local law enforcement units to protect the safety of employees or students and the property of the schools and individuals . . . The Commission sees no reason to recommend that an educational institution have less latitude to exchange information with its own security or law enforcement unit than it does to make disclosures to law enforcement units outside the educational institution. Therefore, the Commission believes that a law enforcement unit of an educational institution should be allowed to exchange information with the rest of the educational institution without making its law enforcement records subject to FERPA. At the same time, educational institutions should be able to share education

records, including disciplinary records, with their law enforcement unit only to the same extent as they can share such records with other law enforcement agencies.

Current FERPA requirements prohibit disclosure of education records to law enforcement agencies without parent or student consent, except under judicial order with advance notice to the parent, or in an emergency when such disclosure is necessary to protect the health or safety of the student or other persons. In effect, this prevents educational institutions from sharing information legally with law enforcement units in cases where the safety and welfare of students, faculty, and school property are involved. The emergency exception does not permit routine cooperation with law enforcement agencies even when the educational institution may be a party of interest. The DHEW regulations make this clear by including as one criterion of an emergency, that time be of the essence, and by stressing that the emergency clause is to be construed strictly. In many urban and suburban schools, however, there are extortion rings, gang violence, theft rings, hard drug traffic, and other continuing criminal activities. While education records are seldom vital to the conduct of a criminal investigation, they can sometimes be extremely helpful. It is the Commission's judgment that educational institutions should be allowed to make the determination that a disclosure is necessary as long as it is publicly accountable for its decision." 28/

The commission made the following recommendation for amendment to FERPA:

That the Family Educational Rights and Privacy Act be amended to provide:

(a) that records collected or maintained by the security or law enforcement branch of an educational agency or institution solely for a law enforcement purpose --

(i) shall not be considered to be education records subject to the provisions of FERPA when the security or law enforcement branch does not have access to education records maintained by the agency or institution; and

(ii) may be disclosed only to law enforcement agencies of the same jurisdiction and to school officials responsible for disciplinary matters;

(b) that disclosure of information may be made by an educational agency or institution to law enforcement officials without the consent of the student or parent, provided that:

(i) an official determination is made by the educational agency or institution (and not by a com-

ponent thereof) that the information disclosed is necessary to an authorized investigation of ongoing violations of law which threaten the welfare of the educational agency or institution or its students or faculty; and

(ii) each determination is publicly reported to the governing board of the agency or institution including the type of information disclosed the number of individuals involved, and the justification for such disclosure, but not the names of the individuals involved. 29/

The Commission's recommendation is sound as far as it goes, and is endorsed by this project, (except for the limitation of disclosure to agencies of the same jurisdiction discussed previously) but it does not deal sufficiently with the statutory problem. It is not clear why the institution should be able to communicate with law enforcement agencies to protect only its own interests or those of its students, but not in instances when the public is threatened. The emergency exception for disclosure is not sufficient to handle law enforcement investigation to solve or to prevent crime, and the Commission's recommended change would partially deal with that. It is the further recommendation of this project, however, that the law enforcement exemption in FERPA be broadened and clarified to: (1) permit a student to see any law enforcement records which are relied upon by an institution's officials for the purpose of disciplinary proceedings; (2) keep confidential the investigative information compiled in the course of a legitimate law enforcement inquiry in behalf of the public or the institution until the inquiry is completed; (3) allow disclosure of education records to campus or public law enforcement units (whether or not they are of the "same jurisdiction") when the institution has made a determination that it is in the interest either of the institution or the public so to do; and (4) permit disclosure of law enforcement information to designated school authorities with responsibility for student discipline.

The initial determination for the institution is whether it desires an exemption for campus law enforcement records, for it seems that only when an institution's security unit conducts investigations is restriction of student access necessary. If an exemption is not claimed, then FERPA treats law enforcement or disciplinary records the same as education reords. If a law enforcement exemption is claimed, then the "two hats" worn by the dean of students ought to be appreciated and accommodated, and the function of a college judiciary board should be respected. When education and law enforcement information each must be examined by a dean or board for the purpose of making a disciplinary determination regarding a student, a law enforcement exemption ought not to be forfeited.

Though the current FERPA language can create significant difficulties for law enforcement, it appears not to have done so for the following reasons:

- Campus police do not have very much significant personal information in the first place, and what they have may not be readily accessible; some units surveyed index incident reports chronologically or by campus location for example. (The increasing availability of electronic data processing may change that picture soon.)

- Many institutions choose not to exercise the law enforcement records exemption, and thus do not confront the problem.

- The spirit of the law, rather than its letter, appears to be observed by those institutions that do exercise the law enforcement exemption. It seems that college officials have access to law enforcement and education records whenever it seems reasonable, balancing student interests against institutional and public interests. The survey uncovered no evidence of abuse or unfairness, though that does not mean there is none.

- Disclosure of information to a local or public law enforcement agency seems to depend upon the relationship between the institution and the agency. Though there is no documentation, the surveyors suspect that campus authorities disclose information to public law enforcement agencies when it appears "appropriate" to do so.

The net result of this is that law enforcement appears not to have been negatively affected because the relevant provision of FERPA has not been strictly followed. The foregoing recommendations strike a balance between the interests of law enforcement, the academic institution and its students.

Access Control

Even though institutional records may be highly decentralized, it appears that third party inquiries are handled centrally, generally through the office of student affairs. It is reportedly very rare for any third party inquiry to be made directly to an institutional component such as a departmental office, or a specific instructor or counsellor. All persons interviewed said that any third party inquiry would be referred to the office of student affairs. Thus, access control is achieved informally, because the surveyors did not find any institution wherein the practices regarding disclosures from decentralized record locations was monitored. It was not routine, at any institution visited, for the FERPA officer to check with the various record centers regarding procedures with respect to first, second or third party inquiries. Such a procedure makes good sense and should be part of every institution's FERPA program. Nevertheless, the survey team had no reason to believe that third party inquiries were customarily addressed to or answered by institutional entities other than a central authority such as the office of student affairs.

CONCLUSION

The general conclusion reached in the course of this project is that FERPA is working fairly well in postsecondary institutions to: (1) give students access to records about them; (2) provide procedures for correction of records; and (3) make the student's consent the prime factor in controlling disclosures of education records to third parties. Second party inquiries are not being adequately controlled at present because institutions do not have policies regarding the circumstances in which officials or faculty of the institution may have access to student records.

There was no evidence unearthed by the survey to indicate that idle curiosity or a desire to meddle is a compelling reason driving school personnel to rummage student records. The decentralization of records itself is a deterrent to such behavior, but more importantly the attitudes of administrators and faculty support student interests and discourage such behavior. Though some abuses of education record confidentiality may exist, they would not become apparent to school officials because there is not clear policy as to what would be an improper second-party inquiry, and there are no logs of such access. New technology in record systems may change this, however.

In several of the schools visited, automated systems for some aspects of education records had been recently implemented or were being considered. As computer technology makes automated systems more feasible, centralization of records can occur with easy access from remote terminals. Though such systems make records more accessible, they also permit automatic logging and monitoring of requests for access and disclosures. The potential for abuse of education records can be minimized if schools prepare comprehensive policies for records management before their systems are substantially automated. The general good will and professionalism of administration and faculty may be sufficient for current records management needs, but those provlivities alone will not be enough for sophisticated and easily accessed information systems.

The project staff concluded that if FERPA were to be strictly implemented regarding the requirements for law enforcement records, then law enforcement effectiveness might be impaired; the law enforcement exemption is too limiting. Colleges and universities ought not to be sanctuaries for wrongdoers, but the current inadequacies of the law enforcement and emergency exemptions contribute to such a situation. The inference (though there is no documentation) is that institutional administration and faculty have been sharing information with law enforcement when it appears reasonable to do so, (even when in technical violation of FERPA). responsible conduct by college officials ought to be made legitimate in law, and the recommendations of the Privacy Protection Study Commission and this project promote a fair balance to protect students, schools and the public.

FOOTNOTES

1. 20 U.S.C.A. § 1232 g.

2. See, e.g. 120 Cong. Rec. 39866 (Daily ed. Dec. 31, 1974) Remarks by Wm. Buckley.

3. 20 U.S.C.A. 1232g, effective date Nov. 19, 1974.

4. 45 C.F.R. 99.1 et seq.

5. 20 U.S.C.A. § 1232g(a)(3); 45 C.F.R. 99.1.

6. 20 U.S.C.A. § 1232g(b)(4)(d); 45 C.F.R. 99.9.

7. 20 U.S.C.A. § 1232g(a)(6); 45 C.F.R. 99.3.

8. 20 U.S.C.A. § 1232g(a)(4)(A).

9. 20 U.S.C.A. § 1232g(a)(4)(B).

10. 20 U.S.C.A. § 1232g(a)(5)(A).

11. 20 U.S.C.A. § 1232g(a)(2); 45 C.F.R. 99.21(c).

12. Id.

13. 20 U.S.C.A. § 1232g(b)(1); 45 C.F.R. 99.30, 31.

14. 20 U.S.C.A. § 1232g(b)(4)(A); 45 C.F.R. 99.32.

15. 20 U.S.C.A. § 1232g (b)(4)(E); 45 C.F.R. 99.6.

16. 20 U.S.C.A. § 1232g(b)(4)(F); 45 C.F.R. 99.60.

17. For information concerning the development of computer technology and microprocessors, see, e.g., Report of the Privacy Protection Study Commission, Appendix 5, "Technology and Privacy; Davis, "Evolution of Computers and Computing, and Hammer, "A Forecast of the Future of Computation, both in C.L.S.A. (1977).

18. 20 U.S.C.A. § 1232g(a)(6).

19. 20 U.S.C.A. § 1232g(a)(1)(B).

20. See, e.g., "Privacy and Security of Criminal History Information: An Analysis of Privacy Issues, U.S. Department of Justice (L.E.A.A.), G.P.O. 027-000-0712-1.

21. 20 U.S.C.A. § 1232g(a)(1)(B).

22. 20 U.S.C.A. § 1232g(b)(1)(A).

23. 20 U.S.C.A. § 1232g(b)(4)(A).

24. 20 U.S.C.A. § 1232g(b)(1)(H).

25. 20 U.S.C.A. § 1232g(a)(4)(B)(ii).

26. 20 U.S.C.A. § 1232g(b)(1)(I).

27. 28 C.F.R. Ch. 1, Part 20.

28. Report of the Privacy Protection Study Commission, "Personal Privacy in an Information Society," pp. 442 et. seq. (G.P.O. No. 052-003-00395-3).

29. Id.

30. 28 C.F.R. Ch. 1, Part 20.

APPENDIX

During the course of the survey, and primarily as a result of discussions with representatives and members of the International Association of College and University Security Directors, the International Association of Chiefs of Police, and the Federal Bureau of Investigation, a problem was raised that does not involve FERPA, but we present the matter anyway. It deals with the ability of private college or university security personnel to gain access to information maintained by public law enforcement agencies.

The FBI maintains a National Crime Information Center (NCIC) which has information on wanted persons, fugitives from the law, stolen automobiles and other property; the FBI also keeps records on persons convicted of Federal crime. State and local law enforcement agencies maintain criminal justice records about state offenders.

The FBI, and the regulations of the Department of Justice promulgated to deal with the confidentiality of state and local criminal justice records, provide that only a "law enforcement agency" may have access to Federal, state or local criminal justice records, and a law enforcement agency is defined as a unit of Federal, state or local government. 30/ Accordingly, law enforcement units at institutions which are part of the state college system or which may be under authority of a city, could qualify as law enforcement units and thus have direct access to federal or state law enforcement records. The law enforcement units of private academic institutions, however, are not permitted to have such access; they get the information, if at all, by request to a local law enforcement agency which agrees to make the inquiry and then pass the information to the private institution's security office. Private institution security personnel argue that they should be permitted to have direct access to such information because the distinction between a public and private institution does not make any sense with respect to their function and need for criminal justice information.

That matter is beyond the scope of this study and the project makes no recommendation one way or another on the issue. It should be noted, however, that the same situation applies to security and law enforcement units in the private sector, such as private detective and security organizations, or the security units operated by large corporations. These entities are also denied routine access to confidential government law enforcement information. Anyone interested in pursuing the subject further can consult the discussion in LEAA's publication: "Privacy and Security of Criminal History Information: An Analysis of Privacy Issues," pp. 22 et. seq.